

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-738841

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ROBERT CALHOUN, JR., :

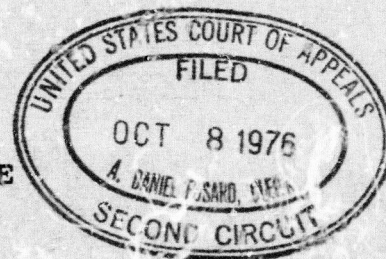
Plaintiff-Appellant, :

-against- :

THE STATE OF NEW YORK, its agents, :
SUPREME COURT OF NEW YORK, QUEENS :
COUNTY, CHIEF CLERK KALISKI, COURT :
OFFICER REED, MR. KRUMSEIK and :
ALICE M. SMITH CALHOUN and GEORGE M. :
WINSTON, :

Defendants-Appellees
-----X

BRIEF FOR APPELLATE STATE
OF NEW YORK AND SUPREME
COURT OF THE STATE OF
NEW YORK



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Question Presented

Facts

This appeal is from an order of the United States District Court, Eastern District of New York (Judd, J.) dated September 26, 1975 dismissing a civil rights action pursuant

to 42 U.S.C. § 1983 against the State of New York, the Supreme Court of the State of New York, its Chief Clerk and Court Officers.* Other defendants are the appellant's ex-wife and her attorney in their state matrimonial action.

The complaint seeks in this action two-thirds of the sum of \$25,000,000 in damages claiming that the State misused legal process in granting a divorce to appellee wife.

Judge Judd in the court below sua sponte dismissed the action on the grounds that the State of New York and the Supreme Court of the State of New York are not "persons" within the meaning of the Civil Rights Act and that appellant's recourse with respect to his matrimonial action belonged in State Court.

Appellant then made a motion for a default against the State, Supreme Court and "named" Court employees. Judge Judd in a order dated December 4, 1975 denied said motion.

* A copy of the Summons and Complaint in the action was served on the Office of the Attorney General, Two World Trade Center on September 24, 1975. Service was never made on defendants "Krumseik", "Kaliski" and "Reed" who are State court employees. Pursuant to § 17 of the Public Officers Law of the State of New York, the Attorney General has not been requested to represent them.

The Appendix filed by the appellant contains copies of transcripts and records in a divorce action entitled Calhoun v. Calhoun, Supreme Court of the State of New York, Queens County, Index No. 9866/75. The Appendix contains a copy of an order and the transcript of a hearing before State Supreme Court Justice Edwin Kassoﬀ both dated subsequent to the institution of this suit denying the appellant's motion to vacate the decree of divorce. Furthermore, there is, according to the Appendix, an appeal filed by appellant from the order granting his wife a divorce to the Appellate Division of the Supreme Court.

I.

The district court properly held that the appellees State of New York and the Supreme Court of the State of New York may not be sued for damages as alleged in the complaint. It is of course settled that the Eleventh Amendment bars such suits in the federal courts. Edelman v. Jordan, 416 U.S. 134 (1974); Rothstein v. Wyman, 467 F. 2d 226 (2d Cir. 1972), cert. den. 411 U.S. 921.

II.

Moreover, as the district court pointed out, they are not "persons" as denominated in 42 U.S.C. § 1983. Monroe v. Pape, 365 U.S. 167 (1961). Indeed the State of New York definitely may not be sued for any injunctive relief and the better rule is that neither may the Supreme Court of the State of New York Zuckerman v. Appellate Division, Second Department, 421 F. 2d 625 (2d Cir. 1970); Clark v. Washington, 366 F. 2d 678 (9th Cir. 1966).

III.

Finally the allegations of lack of due process resulting from his wife obtaining a "default" decree of divorce were resolved in the state courts. There appellant moved to vacate the default [after the commencement of the within action], was afforded a full hearing and determination made denying his application. From such denial plaintiff appealed to the state appellate court where the appeal is pending. Apart from the role that this Court should not interfere with the state court proceedings initiated there by this plaintiff. Huffman v. Pursue, 425 U.S. 92 (1975); the plaintiff is collaterally estopped, if not barred also by

res judicata from the litigation here. Lecci v. Cahn,
493 F. 2d 826, 829-830 (2d Cir. 1974); Thistlewaite v.
City of New York, 497 F. 2d 339 (2d Cir. 1974); Taylor v.
N.Y. City Transit Authority, 433 F. 2d 665 (2d Cir. 1970);
Lombard v. Board of Education, 502 F. 2d 631, 636-637
(2d Cir. 1974); Tang v. Appellate Division, 487 F. 2d 138,
141 (2d Cir. 1973) cert. den. 416 U.S. 906.

CONCLUSION

THE ORDER APPEALED FROM SHOULD
BE AFFIRMED WITH COSTS

Dated: New York, New York
October 12, 1976

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
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Attorney for the State of
New York

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HAROLD TOMPKINS
Assistant Attorney General
of Counsel

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

MARY KO , being duly sworn, deposes and
says that she is employed in the office of the Attorney
General of the State of New York, attorney for State of New York
herein. On the ¹⁴12th day of October , 1976 , she
served the annexed upon the following named person :

ROBERT CALHOUN, JR.
Pro Se
111-11 132nd Street
Jamaica, New York 11420

GEORGE M. WINSTON
Pro Se and Attorney for
Alice M. Smith Calhoun
108-18 Queens Blvd.
Forest Hills, New York 11375

Attorneys in the within entitled action by depositing
3 copies
a/true and correct ~~copy~~ thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by
the Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorneys at the
address es within the State designated by them for that purpose.

Mary Ko

Sworn to before me this
12th day of October , 1976

J. H. Taylor
Assistant Attorney General
of the State of New York